No. 92-1370

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

In Re: BFP, a Partnership,
Debtor.

BFP, a Partnership,
Petitioner,

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,
Respondents

On Amended Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ AND RICHARD MARCZ

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QUESTIONS PRESENTED FOR REVIEW
(Rule 14.1(a))

Respondents believe that the only proper question for review is:

Did the United States Court of Appeals for the Ninth Circuit err in concluding that "the price received at a noncollusive regularly conducted foreclosure sale establishes irrebuttably reasonably equivalent value under 11 U.S.C. § 548(a)(2)(A)"?

LIST OF ALL PARTIES
(Rule 24.1(b))

Petitioner:

BFP, a Partnership.

Respondents:

Paul Osborne; William Little; Dennis Roy; Arthur Ritz; Jose Cruz; and Richard Marcz.

Respondent:

Resolution Trust Corporation as Receiver of Imperial Federal Savings Association.

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W. Conant, Beyond Madrid: Resolving the Conflict Within the Ninth Circuit Regarding § 548(a)(2)(A) and Nonjudicial Foreclosure Sales, 18 Cal. Bankr. J. 221 (1990) 18

S. Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objections, 71 Va. L. Rev. 933 (1985) 23

J. McLaughlin, Amendment of the Bankruptcy Act, 40 Harv. L. Rev. 583 (1927) 16

4B Moore & King, Collier on Bankruptcy ¶ 70.68, p. 750 (14th ed. 1978) 16

R. Powell, The Law of Real Property, § 466, p. 37-316 § 439, p. 37-14, § 486(6), p. 37-332-333 (1993) 14, 15, 20

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BRIEF IN OPPOSITION FOR RESPONDENTS PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ AND RICHARD MARCZ

OPINIONS BELOW

In Re BFP, 974 F.2d 1144 (9th Cir. 1992) (*see* Appendix to Amended Petition herein, p. 1); *In Re BFP,* 132 B.R. 748 (9th Cir. BAP 1991) (*see* Appendix to Amended Petition herein, p. 49).

STATEMENT OF JURISDICTION

Respondents are dissatisfied with Petitioner's Statement.

The decision of the Ninth Circuit Court of Appeals is not in conflict with decisions of other courts of appeals, as cited by Petitioner. In fact, it is in conformity with most of the other decisions cited by Petitioner.

The decision of the Ninth Circuit Court of Appeals is not an important question of federal law. Indeed, the statutory provisions involved must be applied according to the specific laws of the various States.

The decision of the Ninth Circuit interpreted the statutory provision involved according to the plain language of the provision.

STATUTE INVOLVED

The only real statute involved in the decision of the Ninth Circuit Court of Appeals, and pertinently involved herein is: 11 U.S.C. § 548(a)(2)(A). *(See* Appendix to Amended Petition, pp. 69-70).

STATEMENT OF THE CASE

Petitioner has omitted several important substantive and procedural facts from its Statement.

Petitioner was first a debtor in a Chapter 11 bankruptcy case (involuntary) on December 31, 1988.

Imperial Federal Savings Association ("Imperial") (now represented herein by the Resolution Trust Corporation) held the

most senior deed of trust on Petitioner's real property. Because Petitioner had defaulted on its deed of trust payments, Imperial requested, and obtained, relief from the automatic stay, and permission, from the United States Bankruptcy Court to proceed with its pending non-judicial foreclosure and a trustee's (foreclosure) sale.

Then, prior to formal entry of an order on Imperial's behalf, Petitioner voluntarily requested an order dismissing the Chapter 11 bankruptcy case. The order was entered, and the bankruptcy case dismissed, on June 14, 1989.

On July 12, 1989 — almost one month after the first bankruptcy case was dismissed, and over 3 1/2 months before the instant bankruptcy case was commenced — the real property was sold by Imperial at a trustee's (foreclosure) sale.[1] Respondents were the third-party purchasers, paying $433,600 cash. At the time of the sale, the amount owed to Imperial was only $421,815.72. The surplus proceeds were made available to the junior trust deed holders, whose $200,000+ junior deed of trust was extinguished by Imperial's foreclosure sale.

A Trustee's Deed Upon Sale was executed and delivered on July 18, 1989, at which time title to the property became vested in Respondents. Calif. Civil Code §§ 1091, 1053, 1054. On July 21, 1989, the Trustee's Deed was recorded, pursuant to California law, with the Official Records of Orange County.

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1. Although Petitioner, again, refers to facts regarding "notice" (*see* Amended Petition, p. 7), Petitioner's adversary complaint did not seek to have the trustee's (foreclosure) sale set aside based on any lack thereof. Petitioner's adversary complaint did not allege any failure to comply with the strict notice requirements of California statutes. Petitioner expressly admitted to the Bankruptcy Court that it could not allege or prove any failure to comply with any requirement mandated by the comprehensive California statutes governing foreclosures. Petitioner received all the notice(s) required by law.

Two state court actions were then filed, by Petitioner and others, challenging the trustee's (foreclosure) sale. The first action was voluntarily dismissed by Petitioner and others. On October 25, 1989, two weeks after Respondents filed a demurrer challenging the sufficiency of Petitioner's complaint in the other action — and only two days before the hearing on Respondents' demurrer — Petitioner filed this, its second, Chapter 11 bankruptcy case.

On or about November 24, 1989, Petitioner filed its adversary complaint and challenged the trustee's sale, and commenced the proceedings directly below.

On December 14, 1989, the United States Bankruptcy Court vacated the automatic stay in Petitioner's Chapter 11 case "for all purposes" as to Respondents.

On March 6, 1990, after Petitioner admitted that it could not prove any non-compliance with California foreclosure statutes, the United States Bankruptcy Court, on Respondents' motion pursuant to Rule 12(b)(6) F.R.C.P. and Federal Bankruptcy Rule 7012(b), dismissed Petitioner's complaint as to Respondents. That dismissal was subsequently affirmed by both the United States District Court for the Central District of California and the Court of Appeals for the Ninth Circuit (*In Re BFP*, 974 F.2d 1144 (9th Cir. 1992) ("Ninth Circuit's decision below"). (Petitioner's complaint against Imperial proceeded to a summary judgment in Imperial's favor. That judgment was subsequently affirmed by both the United States Bankruptcy Appellate Panel for the Ninth Circuit (*In Re BFP*, 132 B.R. 748 (9th Cir. BAP 1991)) and the Court of Appeals for the Ninth Circuit (*In Re BFP* (9th Cir. 1992)), *supra.)* Pursuant to an order filed on November 17, 1992, Petitioner's petition to the Ninth Circuit for rehearing was denied, and its suggestion for rehearing en banc was rejected. No active Circuit judge requested a vote for a hearing en banc.

SUMMARY OF ARGUMENT

The issuance of a writ of certiorari is a drastic remedy and should not occur herein.

Inasmuch as the real property Petitioner sought to recover has been sold, and as Petitioner failed to obtain a stay pending appeal, this proceeding is moot.

Based on the cases cited by Petitioner, there is no real conflict between the decision of the Court of Appeals for the Ninth Circuit and decisions of other Courts of Appeal.

The intent of Congress as to the meaning or application of the term "reasonable equivalent value", as contained in 11 U.S.C. § 548(a)(2)(A), is not explicit or clear. There is no reason why the laws of the States which do not directly conflict with 11 U.S.C. § 548(a)(2)(A) cannot remain valid and enforceable. Congress has failed to amend 11 U.S.C. § 548(a)(2)(A), or the United States Bankruptcy Code, to prohibit courts from reaching the same conclusion as the Court of Appeals for the Ninth Circuit reached.

It is indisputable that an interest in real property, or a deed of trust, or the mechanics of a foreclosure and foreclosure sale must all be determined, even in a bankruptcy context, according to the laws of the various States. Those laws do vary, and such variety is permissible and common.

It is not error for a federal bankruptcy statute to be interpreted and applied so as to achieve harmony with the laws of a particular State or States. To the contrary, such harmonization is essential and required for the orderly administration of justice.

REASONS FOR DENYING THE WRIT

I.

ISSUANCE OF A WRIT OF CERTIORARI IS A DRASTIC REMEDY AND IS TO BE USED SPARINGLY.

It is beyond dispute that this Supreme Court's exercise of its jurisdiction through a writ of certiorari should be exercised only in cases of grave importance. *Re Woods*, 143 U.S. 202, 206, 12 S. Ct. 417, 36 L. Ed. 125 (1892). The power to issue a writ of certiorari should be used "sparingly" and only where there is "the necessity" to deal with a significant conflict. *Forysyth v. Hammond*, 166 U.S. 506, 513-515, 17 S. Ct. 665, 41 L. Ed. 1095 (1897).

The issue presented herein, regarding the interpretation of 11 U.S.C. § 548(a)(2)(A), is not one of "grave importance". There is no real "necessity" to resolve any conflict between various courts of Appeal because, as noted below, there is no real conflict. No writ of certiorari should be issued herein.

II.

PETITIONER'S PETITION IS MOOT AS IT FAILED TO OBTAIN A STAY PENDING APPEAL AND THE PROPERTY IT SOUGHT TO RECOVER HAS BEEN SOLD.

Petitioner's adversary complaint herein was brought solely pursuant to "Section 548(a)(2)(A) and (B)(i)". That complaint sought to recover the involved real property by declaring the transfer to Respondents null and void, and to set aside the trustee's deed to Respondents. Petitioner's complaint did not pray for monetary damages nor did it seek to recover the value of the real property, as authorized by 11 U.S.C. § 550(a).

Petitioner now admits, however, that the real property (which it has sought to recover) had been sold 3 years ago during the pendency of Petitioner's proceedings herein, and that a deed was recorded evidencing such sale. *See* Amended Petition p. 2, fn. 2.

As indicated by Petitioner's Statement of the Case, and the record, Petitioner never sought a stay (pending appeal herein) as to the Bankruptcy Court's judgment which vacated the automatic stay "for all purposes" as to Respondents.

This appeal, and petition proceeding, are therefore moot. It is well-settled that the failure to obtain a stay pending appeal, and the subsequent transfer of the property involved, render an appeal moot. *Heitmuller v. Stokes*, 256 U.S. 359, 361-62, 41 S. Ct. 522, 65 L. Ed. 990 (1921); *In Re Mann*, 907 F.2d 923, 926 (9th Cir. 1990) — without a stay, an appeal will not affect the rights of a purchaser at a sale occurring during the appeal "even when the purchaser knows of the pendency of the appeal"; *In Re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988); *Valley National Bank of Arizona v. Trustee*, 609 F.2d 1274, 1283 (9th Cir. 1979); *In Re Combined Metals Reduction Co.*, 557 F.2d 179, 190-91 (9th Cir. 1977) — transfers and sales cannot be rescinded or voided where those transactions have been consummated and the purchasers are not parties to the appeal.

Petitioner failed to seek any stay from the Bankruptcy Court below or herein. The property which Petitioner's complaint sought to recover has been sold to purchasers who were never made parties herein. A deed was recorded, as notice to the world, to consummate and evidence that sale. Petitioner's complaint, and this proceeding, to recover that property is now moot.

III.

THERE IS NO REAL CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE OTHER COURTS OF APPEALS' DECISIONS CITED BY PETITIONER.

Petitioner maintains (*see* Amended Petition p. 10) that the Ninth Circuit's decision below is in conflict "with the decision of the Courts of Appeal of five other circuits".

In reality, however, there is no real conflict with those cited decisions. Petitioner has again ignored factual and procedural distinctions in those cited decisions, and has over-broadly and one-sidedly characterized their result.

As to the Fifth Circuit, Petitioner has referred this Supreme Court to decisions in *Durrett v. Washington National Insurance Co. (In Re Durrett)*, 621 F.2d 201 (5th Cir. 1980) and *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981), *rehrg. denied, cert. denied,* 454 U.S. 1164, 102 S. Ct. 1038 (1981).

Durrett, however, involved the Bankruptcy Act of 1898 ("the Act"), not the Bankruptcy Reform Act of 1978 ("the Bankruptcy Code"). *Durrett* decided the application of § 67d of the Act, which was not at all identical to 11 U.S.C. § 548(a)(2)(A) involved herein (621 F.2d at 202). The only authority relied on by the *Durrett* court, *Schafer v. Hammond*, 456 F.2d 15 (10th Cir. 1972) (*see* 621 F.2d at 203) was also an Act case which did not involve a public sale or public auction (as occurred with the foreclosure sale herein). (456 F.2d at 16, 17). Any determination in *Durrett* as to a test for determining "value" has been repeatedly and correctly characterized as only dictum. *Federal Deposit Insurance Corp. v. Blanton*, 918 F.2d 524, 531 fn. 7 (5th Cir. 1990); *In Re Littleton*, 888 F.2d 90, 92 (11th Cir. 1989); *Matter of Grissom*, 955 F.2d

1440, 1444, 1449 (11th Cir. 1992) — *Durrett* is no longer the law. *Durrett* did not consider the Ninth Circuit's decision below or the prior decision upon which it was based.

Abramson also is an Act case, and did not consider the Bankruptcy Code. *Abramson* also decided the application of § 67d of the Act, which was not at all identical to § 548(a) involved herein. (647 F.2d at 547, 548). *Abramson* did not even involve any issue or determination of "value". Instead, it was focused on the issue of whether the sale therein constituted a "transfer" (647 F.2d at 548, 549). *Abramson* did not consider the Ninth Circuit's decision below or the prior decision upon which it was based, and did not make any determination regarding value.

Indeed, the decisions reached in *Durrett* and *Abramson* have been severely criticized and are not entirely valid anymore. *Federal Deposit Insurance Corp. v. Blanton, supra; Sandoz v. Bennett*, 807 F.2d 1234, 1238 fn. 6 (5th Cir. 1987); *Matter of Grissom, supra; In Re Littleton, supra*).

For the Eighth Circuit, Petitioner has referred this Supreme Court to the decision in *First Fed. Sav. & Loan Ass'n Bismark v. Hulm (In Re Hulm)*, 738 F.2d 323 (8th Cir. 1984), *cert. denied*, 469 U.S. 990, 105 S. Ct. 398 (1984). *Hulm*, however, did not deal with a debtor's complaint to avoid a foreclosure sale under 11 U.S.C. § 548(a), as is involved herein. Rather, a mortgage holder had brought a proceeding to determine that a property was not part of the bankruptcy estate. While the issue of "value" was discussed in *Hulm*, it did not reach a decision interpreting that term nor the language of 11 U.S.C. § 548(a). Instead, the Court of Appeals remanded the case back to the bankruptcy court "for a determination" of value. (738 F.2d at 327). As noted below, such a determination was made by the Bankruptcy Court herein. *Hulm* did not consider the Ninth Circuit's decision below, and it did not expressly disagree with the prior *Madrid* (9th Cir. BAP) decision upon which it was based.

For the Eleventh Circuit, Petitioner has referred this Supreme Court to *Matter of Grissom*, 955 F.2d 1440 (11th Cir. 1992).

Grissom, however, involved a Chapter 13 bankruptcy case not a Chapter 11 as herein. *Grissom* concluded that a determination of reasonable equivalent value pursuant to 11 U.S.C. § 548(a)(2)(A) should be based on an inquiry as to all circumstances. (955 F.2d at 1445). As noted below, such a determination was made in the Bankruptcy Court below. *Grissom* did not, however, disagree with the prior decision, in *Lawyers Title Insurance Corp. v. Madrid (In Re Madrid)*, 21 B.R. 424 (9th Cir. BAP 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984), *cert. denied*, 469 U.S. 833, 105 S. Ct. 125 ("prior decision upon which it was based", "*Madrid* (9th Cir. BAP))", on which the Ninth Circuit's decision was based. The *Grisson* Court of Appeals said merely that "we did not go this far in *Littleton* and decline to do so today." (955 F.2d at 1446, fn. 6).

In fact, *Grissom* did agree, similar to the decision herein by the Ninth Circuit, that:

> Absent fraud, collusion, or irregular or unlawful procedures, courts should presume that a legitimate foreclosure sale brings a price which is reasonably equivalent to the property's value.

955 F.2d at 1446.

The *Grissom* court also pointed out that:

> Nullifying a legitimate foreclosure sale . . . may advance bankruptcy policy, but it also violates the policy protecting the rights of secured creditors and diminishes the integrity of foreclosure sales. See, e.g., War Eagle Floats, Inc. v. Travis (In re War Eagle Floats, Inc.), 104 B.R. 398, 400-401 (Bankr. E.D. Okla. 1989); In re Upham, 48 B.R. 695, 697 (Bankr. W.D.N.Y. 1985).

Similar to *Hulm*, the *Grissom* Court of Appeals did not reach a decision interpreting "value" as contained in 11 U.S.C. § 548(a). Instead, the Court of Appeals also remanded the case back to the district court for further proceedings to determine "value". 955 F.2d at 1449. As noted below, such a determination was made in the Bankruptcy Court below. *Grissom* did not consider the Ninth Circuit's decision below, and it did not disagree with the prior decision upon which it was based.

For the Third Circuit, Petitioner has referred this Supreme Court to *Barrett v. Commonwealth Federal Savings Ass'n.*, 939 F.2d 20 (3rd Cir. 1991).

In *Barrett*, however, the parties had stipulated at trial that "value" required by 11 U.S.C. § 548(a)(2)(A) would be interpreted pursuant to the *Matter of Bundles*, 856 F.2d 815 (7th Cir. 1988), standards. As noted below, those factors, required therein to be reviewed, were reviewed hereinbelow.

The *Barrett* Court of Appeals did not espouse its own method for determining "reasonable equivalent value". 939 F.2d at 23.

More importantly, the *Barrett* decision stated that "[r]elief from foreclosure sale under § 548 should be reserved for extraordinary situations where state law and sheriff's office procedures have not been followed. . . ." 939 F.2d at 24-25, fn. 7, 25. Despite arguments relating to "value", the Court of Appeals determined there were no extraordinary circumstances in the case and it allowed the foreclosure sale to stand. 939 F.2d at 25.

Barrett did not consider the Ninth Circuit's decision below

nor the prior decision upon which it was based. *Barrett's* result was exactly the same as has occurred herein, namely that, after an evidentiary review, nothing extraordinary existed which would warrant setting aside the foreclosure sale based solely on the price paid.

Lastly, for the Seventh Circuit, Petitioner has referred this Supreme Court to *Matter of Bundles, supra.*

The difference between *Bundles* and the Ninth Circuit's decision below is purely semantical. In practicalities, they are nearly identical (except where *Bundles* attempts to circumvent State deed of trust[2] and foreclosure laws).

Bundles expressly points out, similar to the Ninth Circuit's decision below, that:

> [T]he bankruptcy court must focus ultimately on the fair market value as affected by the fact of foreclosure. *As a practical matter, the foreclosure sales price is the only means of measuring the effect of foreclosure on the value of property.* Indeed, in usual circumstances, it would be appropriate to permit a rebuttable presumption that the price obtained at the foreclosure sale represents reasonably equivalent value.

856 F.2d at 824 (Emphasis added).

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2. Pursuant to California statutory law, a deed of trust may, identical to a mortgage, contain a private power of sale through foreclosure. Calif. Civil Code §§ 2920(b), 2924, 2924c, 2924g(a). Although trust deeds are preferred in California, the terms "trust deed" and "mortgage" are fairly syonymous. 5 B. Witkin, *Summary of California Law* (9th ed. 1987) "Secured Transactions", § 4, p. 517.

Bundles concludes that a determination for "reasonable equivalence" should be based on all the facts in each case. 856 F.2d at 824.

Hereinbelow, the Bankruptcy Court, in matters concerning Petitioner's complaint and the foreclosure sale, held evidentiary hearings on Respondents' Motion to Dismiss, Respondents' Motion for Relief from Automatic Stay and on Imperial's Motions for Summary Judgment, in addition to numerous adversary and case hearings. The determination by the Bankruptcy Court below considered all the pertinent factors which *Bundles* said should be examined.

The single most important non-price factor as stated by *Bundles* was compliance with state foreclosure sale requirements. 856 F.2d at 825. Hereinbelow, the Bankruptcy Court was apprised by Petitioner that it could not demonstrate that any California requirements were not fully complied with. Upon receiving competent evidence, the Bankruptcy Court also reached a specific judgment that the foreclosure sale was regularly and properly conducted. *See Madrid,* 21 B.R. at 426-427 (9th Cir. BAP) — compliance with state laws is, in accord with bankruptcy purposes, "a safeguard against the evils of private transfers to relatives or favorites."

As to the determination of a fair appraisal (856 F.2d at 824), California foreclosure statutes do not contain a requirement for such a document. *See* Calif. Civil Code §§ 2924 *et seq.* ("the California foreclosure statutes"); §§ 2924f, 2924g, 2924h — no appraisal is required for a foreclosure (trustee's sale). California nonjudicial foreclosure sales are sales which are governed by the highest price received at a public sale. *See* Calif. Civil Code §§ 2924h(c) — property is sold based on "the last and highest bid". As such, the appraisal factor is of no consequence.

In any event, the Bankruptcy Court herein was presented with Petitioner's bankruptcy schedules, adversary pleadings and self-serving declarations as to the property's alleged value. Apparently Petitioner submitted no appraisals.

As to determining advertising for the sale (856 F.2d at 824), California foreclosure statutes contain strict comprehensive requirements for noticing, posting and advertising. *See* Calif. Civil Code §§ 2924, 2924b, 2924c, 2924f — publication in a "newspaper of general circulation" once a week for 20 days; *see also,* R. Powell, *The Law Of Real Property* , § 466, p. 37-316 (1993) — all such prerequisites for sale are established by local law. As such, the only noticing and advertising required is that contained in the foreclosure statutes. *United States Cold Storage v. Great Western Sav. & Loan Ass'n,* 165 Cal. App. 3d 1214, 1229-30 (1985); *Strutt v. Ontario Sav. & Loan,* 28 Cal. App. 3d 866, 877 (1972). The Bankruptcy Court was presented with evidence of compliance with the California foreclosure statutes, which Petitioner could not refute.[3]

As to determining whether competitive bidding was encouraged (856 F.2d at 824), the Bankruptcy Court was presented with evidence of obvious overbidding. Respondents' highest bid price was over $11,780 higher than the amount actually due on Imperial's foreclosed-upon deed of trust. That $11,780 surplus was made available to the holders of a $200,000 deed of trust in a junior

3. It is with this factor in particular, but also possibly others (*e.g.*, appraisal requirement), where other courts have interpreted *Bundles* (and particularly its use of the word "widely") (856 F.2d at 824) to require foreclosure sale actions and conduct to exceed the precise mandates under the comprehensive foreclosure laws of the States. *See In Re Lindsay,* 95 B.R. 983, 991 (Bk. S. D. Cal. 1989); *see also, In Re Kachanizadeh,* 108 B.R. 734, 738 — *Lindsay* violated *stare decisis* and was an improper decision. Imposing additional sale requirements will thus create a conflict, and result in tension, with the specific State laws of foreclosure.

position to Imperial's deed of trust. *See In Re Littleton, supra,* 888 F.2d at 93-94 — reasonable equivalent value has clearly been paid when junior liens are also extinguished by the foreclosure sale.

In addition, the California foreclosure statutes require and encourage competitive bidding. Calif. Civil Code § 2924h; *see* § 2924h(g) — the fixing or restraining of bidding can result in fines and imprisonment; *Block v. Tobin,* 45 Cal. App. 3d 214, 221 (1975); R. Powell, *The Law Of Real Property,* § 439, p. 37-14 (1993).

Thus, at several stages and evidentiary hearings, the Bankruptcy Court below was presented with ample evidence as to all the *Bundles'* factors, which sufficiently demonstrated that a reasonably equivalent value was paid by Respondents at the foreclosure sale herein. The examination of all relevant circumstances, as required by *Bundles,* was made by the Bankruptcy Court herein. Therefore, as mandated by *Bundles* "we must accord [the Bankruptcy Court's determination] great deference." 856 F.2d at 825.

While the Court of Appeals in *Bundles* might disagree with the wording of the Ninth Circuit's opinion below, it could not disagree with the result herein. That result, of upholding the foreclosure sale, was derived herein from the same type of examination and analysis called for in *Bundles.*

There is no real conflict among the different courts of appeal which would necessitate, or justify, the issuance of a writ of certiorari herein.

IV.

CONGRESS DID NOT EXPRESSLY PROVIDE FOR A METHOD OF, NOR DID IT EXPRESSLY PROHIBIT STATE FORECLOSURE LAWS FROM BEING CONSIDERED IN, DETERMINING VALUE PURSUANT TO 11 U.S.C. § 548(a)(2)(A).

There is very little legislative history, and less congressional guidance, as to the phrase "reasonable equivalent value" as set forth in 11 U.S.C. § 548(a)(2)(A). *See Madrid v. Lawyers Title Insurance Corp. (In Re Madrid)*, 725 F.2d 1197, 1199-1200 (9th Cir. 1984) ("*Madrid* (9th Cir.))."[4]

The Historical and Revision Notes to § 548, "Notes of Committee on the Judiciary", Senate Report No. 95-989, pertinently states merely that

> Transfers made for less than a reasonable equivalent consideration are also vulnerable. . . .

As noted in the *Littleton* decision, *supra:*

4. Respected commentators have noted historically that, the philosophical predecessor to § 548(a) of the Bankruptcy Code was § 67d of the Act. *Id.; In Re Littleton, supra,* 888 F.2d at 92 fn. 5. The "present fair equivalent value" requirement of § 67d had the same meaning as the "present value" requirement of § 70d (now, § 549) of the Act. 4B Moore & King, *Collier On Bankruptcy* ¶ 70.68, p. 750 (14th ed. 1978); *see also,* The English Bankruptcy Act of 1914, § 45(g) — transfers for "present fair equivalent value" were protected. The Uniform Fraudulent Conveyance Act defined "fair consideration" as "a fair equivalent". Hence, the predecessor section to 11 U.S.C. § 548(a) required only a valuable consideration. J. McLaughlin, *Amendment of the Bankruptcy Act* 40 Harv. L. Rev. 583, 614-616 (1927); *see also,* Bankruptcy Act of 1800, § 10 — a bona fide purchase for valuable consideration shall not be invalidated.

> [T]he term "reasonably equivalent value" is not capable of precise computation . . . .

888 F.2d at 93.

Absent an express requirement or direction by Congress, the bankruptcy courts and district courts have the duty to determine "reasonable equivalent value" based on the facts presented to them.

Congress did not expressly restrict or prohibit those courts, in making such a determination from applying, or harmonizing with, the foreclosure and real property laws of the States, nor did it preempt any relevant state laws. *California Federal Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 280-281, 292, 107 S. Ct. 683, 93 L. Ed 2d 613 (1987).

Congress also did not expressly prohibit those courts, in making such a determination, from concluding, after an examination of certain factors, that an irrebuttable presumption as to value may arise. *See,* contra, *Matter of Bundles, supra.*

Indeed, it is indisputable that Congress has regularly and knowingly, in almost 15 years, not taken a position, nor defined any guidelines, despite the assorted decisions regarding "reasonable equivalent value". *In Re Ehring*, 91 B.R. 897, 901 (9th Cir. BAP 1988), *aff'd,* 900 F.2d 184, 189 (1990); *In Re Verna,* 58 B.R. 246, 250, 251 (Bk. C.D. Cal. 1986); *In Re Kachanizadeh, supra*, 108 B.R. at 123.

In addition, despite obviously being aware of it, Congress has never drafted legislation nor created any other prohibition or proclamation to overrule, negate, restrict or weaken the authority and reasoning of the prior decision in *Madrid* (9th Cir. BAP). *Id.* Yet, since that decision in 1982 (over 11 years ago), Congress has

amended the Bankruptcy Code five times (in 1984, 1986, 1988, 1990, 1992). By failing to make revisions in the Bankruptcy Code to overrule *Madrid* (9th Cir. BAP), Congress has tacitly approved that decision. *Lorillard v. Pons*,434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 40 (1978); *In Re Execuair Corp.*, 125 B.R. 600, 602-03, 604 (Bk. C.D. Cal. 1991); *see also, Dewsnup v. Timm*, ___ U.S. ___, 112 S. Ct. 773, 779, ___ L. Ed. 2d ___ (1992) — Congress' bankruptcy amendments are written in view of existing laws and practices.[5]

If any congressional intent exists with respect to determining "reasonable equivalent value" under 11 U.S.C.§ 548(a)(2)(A) it is that Congress had not intended to overrule *Madrid* (9th BAP) or any other decision. In effect, Congress' intent is obviously to leave such determinations to the various courts of appeal, which should apply state foreclosure laws, at least in part. It should also be clear that Congress has not prohibited consideration of, nor preempted, the laws of the States as to foreclosure or real property in any determination as to "reasonable equivalent value".

This Supreme Court should not substitute or impose any other intent as to the making of such determinations. No writ of certiorari should be issued herein.

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5. Congress' seeming partial *nolens volens* overruling of *Madrid* (9th Cir.) through the 1984 Amendments, relating to 11 U.S.C.§ 101, did not affect *Madrid* (BAP) as it was based on different reasoning than *Madrid* (9th). *Dewsnup v. Timm*, ___ U.S. ___, ___, 1125 S. Ct. 773, 779, ___ L Ed.2d ___ (1992); *Muniz v. Hoffman*, 422 U.S. 454, 472, 95 S. Ct. 2178, 45 L.Ed 2d 319 (1975); W. Conant, *Beyond Madrid: Resolving The Conflict Within The Ninth Circuit Regarding § 548(a)(2)(A) And Nonjudicial Foreclosure Sales*, 18 Cal. Bankr. J. 221, 240, 241 (1990).

V.

STATE FORECLOSURE LAWS REGARDING VALUE RECEIVED AT FORECLOSURE SALES DO NOT INTERFERE OR DIRECTLY CONFLICT WITH CONGRESS' INTENT OR THE BANKRUPTCY CODE.

Allowing state foreclosure and property laws to apply[6], or presumptions to be reached by courts as to "value", does not interfere with the overall purposes of the Bankruptcy Code and Congress.

The Bankruptcy Code indisputably provides that a creditor's right to foreclosure is not threatened or terminated by a bankruptcy case, and it is unaffected by any discharge. *Johnson v. Home State Bank*, ___ U.S. ___, 111 S. Ct. 2150, 2153-54 (1991). In particular, the avoidance powers set forth in the Bankruptcy Code are intended to assure an equitable distribution among unsecured creditors, which surely does not mean Congress intended to let those unsecured creditors override the rights of trust deed holders or good faith purchasers. *Matter of Winshaw Settlor's Trust*, 758 F.2d 1136, 1139 fn. 4 (6th Cir. 1985).

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6. Generally, Congress has not attempted, within the Bankruptcy Code, to enact, or preempt the States' laws regarding, foreclosure, mortgages or real property. *Barnhill v. Johnson, supra*, 112 S. Ct. at 1389; *Dewsnup v. Timm, supra*, 112 S. Ct. at 778-779; *Johnson v. Home State Bank, supra*, 111 S. Ct. at 2153; *Farrey v. Sanderfoot*, 500 U.S. ___, 111 S. Ct. 1825, 1829, __ L. Ed. 2d __ (1991); *Grogan v. Garner*, 498 U.S. 279, 657, 111 S. Ct. 654, 657, 112 L.Ed. 2d 755 (1991); *Butner v. United States*, 440 U.S. 48, 54-56, 99 S. Ct. 914, 59 L.Ed. 2d 136 (1978) — unless some federal interest requires a different result, state property law should be applied in bankruptcy; *In Re Rigden*, 795 F.2d 727, 736 fn. 1 (9th Cir. 1986) — state laws determine many rights in bankruptcy cases. Pertinent to Respondents herein and in accord with a majority of State foreclosure laws, the bankruptcy laws have always been intended to protect bona fide purchasers. *See* footnotes 4, *supra*, and 7, *infra*.

The only potential asset lost at a foreclosure sale is the equity, if any, in the property sold. Such equity, however, accrues to the benefit of secured creditors, not debtors or unsecured creditors. *Dewsnup v. Timm, supra,* 112 S. Ct. at 778.

Herein, there was no lost equity. The property was encumbered by a senior trust deed of $421,815.72 and a junior trust deed of at least $200,000, totalling $621,815.72. Respondents purchased the property for $433,000, demonstrating a negative equity of [$-188,815.72]. Indeed, as the junior trust deed was extinguished by the foreclosure sale, Petitioner received a significant benefit. *In Re Littleton, supra,* 888 F.2d at 93-94.

State foreclosure laws, which do not allow foreclosure sales to be set aside solely on the basis of an inadequate price *(see Matter of Winshaw Settlor's Trust, supra,* 758 F.2d at 1139 — such laws are a "well-nigh universal rule"; R. Powell, *The Law of Real Property,* § 468[6], p. 37-332-333 (1993)) do not interfere or conflict with Congress' intent or the goals for bankruptcy cases. Such laws require determinations that: the foreclosure sale was conducted pursuant to statutory procedures; full noticing and competitive bidding occurred; the debt owed on the trust deed was paid; no fraud or collusion was present; no extraordinary circumstances existed; among other things. *Central Nat. Bank v. Bell,* 5 Cal. 2d 324, 328 (1936).

Like determinations are implicit in 11 U.S.C. § 548(a)(2)(A), and are recommended by *Bundles.* As noted above (Section III), such determinations were made by the Bankruptcy Court below, based on a multitude of documents and evidence presented to it. Indeed, the Ninth Circuit's decision below expressly requires findings as to: the lack of collusion or fraud; the propriety of conduct at the sale; compliance with state foreclosure requirements (which include noticing and bidding); and the price paid. These findings will, in addition, necessarily be made in light

of: the debtor's bankruptcy pleadings (setting forth, *inter alia,* assets, debts and asserted property values); the debtor's alleged damages or loss of equity (as required by Rule 7009, Federal Rules of Bankruptcy Procedure and Rule 9(g), F.R.C.P. — claims for damages must be specifically stated); and any other evidence submitted by the parties. Only *after* a determination that the required elements exist can a court conclude, according to the Ninth Circuit, that there is a presumption in favor of the price paid at the foreclosure sale.

Inasmuch as the determinations required by State foreclosure laws, and the determinations required by the Ninth Circuit's decision below, involve various factors which are implicitly to be determined pursuant to 11 U.S.C. § 548(a)(2)(A), and do not interfere or directly conflict with the Bankruptcy Code, they are permissible and not preempted.

The basis for the Ninth Circuit's decision below was proper and no writ of certiorari should be issued herein.

VI.

IT IS NECESSARY TO HARMONIZE FEDERAL BANKRUPTCY LAW WITH EXISTING STATE SUBSTANTIVE LAWS.

As noted herein above (Sections III and IV, *supra*), the Bankruptcy Court made the proper evidentiary determinations implicitly required by the Bankruptcy Code. With the correct result at hand, the Ninth Circuit attempted in its decision below to avoid conflicts with State laws.[7-8] It is concluded that:

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7. Herein, it is well-settled under the laws of California, and other States, that a foreclosure sale may not be set aside based solely on the inadequacy of price absent the showing of some other irregularity. *Central Nat. Bank v. Bell, supra; Kennedy v. Dunn,* 58 Cal. 339, 340 (1881); *Stafford v. Russell,* 117 Cal. (Cont'd)

> [B]y following the *Madrid* formulation we are able to give a reasonable meaning to § 548 without unduly upsetting local real estate markets or state law. Unlike the *Bundles* court, we see the issue as *both* one of statutory interpretation *and* the growing tension between preemption and the requirements of a vigorous federal system .... Thus, by interpreting § 548 in accordance with the *Madrid* formulation, we are able to balance bankruptcy policy and comity concerns.

974 F.2d at 1149.

Other courts of appeal have agreed:

> ... The better view is that reasonable equivalence for the purposes of a foreclosure

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(Cont'd)
App. 2d 326, 333 (1953); *Johnson v. Grant*, 87 Cal. App. 402, 405 (1927); *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963); *Matter of Winshaw Settlor's Trust, supra*, 758 F.2d at 1139 — "well-nigh universal rule". In addition, and particularly pertinent as to Respondents, California foreclosure statutes expressly create a "conclusive presumption" in favor of bona fide purchasers at foreclosure sales. Calif. Civil Code § 2924; *Wolf v. Lipsy*, 163 Cal. App. 3d 633, 639 (1985) — this conclusive presumption is irrebuttable; *Napue v. Gor-Mey West, Inc.*, 175 Cal. App. 3d 608, 613 (1985); *Karrell v. First Thrift of Los Angeles*, 104 Cal. App. 2d 536, 539 (1951).

8. The Ninth Circuit's decision below was also in harmony with other decisions regarding applying State law (*see* footnote 6, *infra*), and decisions interpreting different avoidance sections of the Bankruptcy Code, which decisions also authorized regularly conducted foreclosure sales to stand. *See In Re Ehring*, 91 B.R. 897, 900 (9th Cir. BP), *aff'd*, 900 F.2d 184 (1990) — 11 U.S.C. § 547; *In Re Walker*, 861 F.2d 597 (9th Cir. 1988) — 11 U.S.C. § 549(c), if the purchasers record first.

> sale under § 548(a)(2)(A) should be consonant with the state law of fraudulent conveyances ... No support for this drastic upset of state law and procedures is found in the Bankruptcy Code.

Matter of Winshaw Settlor's Trust, supra, 758 F.2d at 1139-40; *see also, Gottlieb v. McArdle*, 580 F. Supp. 1523, 1525 — under the federal law, a foreclosure sale should be set aside only if the price paid shocks our conscience.

> [I]t is important to interpret the two [bankruptcy law and state law] statutes in a way that minimizes such conflicts and harmonizes the policies that underlie them.

Kapela v. Newman, 649 F.2d 887, 890-91 (1st Cir. 1981).

The Ninth Circuit's decision below does just that, and in a way which does not interfere or conflict with bankruptcy purposes or congressional intent. The Court of Appeals was faced with reconciling an unclear bankruptcy statute with a comprehensive system of state foreclosure laws.[9]

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9. The Ninth Circuit also understood that a restrictive interpretation could result in undesirable consequences both on a bankruptcy and state level. Indeed, these consequences would be contrary to any price-maximizing objective of the Bankruptcy Code. "It makes little sense to interpret § 548(a)(2)(A) in a way that will likely discourage healthy foreclosure bidding." 974 F.2d at 1148-1149. The chilling effect which could result from a pre-emptive interpretation of 11 U.S.C. 548(a)(2)(A) is obvious and has been widely discussed. *Matter of Grisson, supra*, 955 F.2d at 1446; *Matter of Winshaw Settlor's Trust, supra*, 758 F.2d at 1139; *Abramson v. Lakewood Bank & Trust Co., supra*, 647 F.2d at 550 (dissent); *In Re Verna, supra*, 58 B.R. at 252 — a rule of certainty is necessary to encourage bidders, maximize amounts paid and create a market for sales; S. Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objections*, 71 Va. L. Rev. 933, 963-64, 980 (1985).

As the California Supreme Court explained in *I.E. Associates v. Safeco Title Ins. Co.*, 39 Cal. 3d 281, 288:

> There are, moreover, persuasive policy reasons which militate against a judicial expansion of those [State statutory] duties. The nonjudicial foreclosure statutes — an alternative to judicial foreclosure — reflect a carefully crafted balance of the interests of the beneficiary, trustors and trustees . . . . In taking all these concerns into account, the statutes strike an overall balance favoring the protection of trustors. (Citations omitted.)

As this Supreme Court has made clear

> Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of that happenstance of bankruptcy." Lewis v. Manufacturers National Bank, 364 U.S. 603, 609. The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee . . . .

Butner v. United States, 440 U.S. at 55.

CONCLUSION

No writ of certiorari should be issued herein.

Petitioner's appeal and this proceeding are moot; the property which Petitioner sought to recover has been transferred.

No actual conflict exists between the various courts of appeal. The Bankruptcy Court below made the determinations, and reviewed all relevant factors, as required by most courts of appeal.

The application of state foreclosure law, or the reaching of an irrebuttable presumption after an evidentiary determination, are not prohibited by, or in conflict with, bankruptcy purposes or congressional intent.

Congress has tacitly approved of, and has never overruled or disapproved of, the opinion in *Madrid* (9th Cir. BAP), which was a basis for the Ninth Circuit's decision below. Indeed, Congress' intent in light of almost 15 years of decisions, is to leave a determination under 11 U.S.C. § 548(a)(2)(A) to the various courts of appeal, subject to state foreclosure laws.

The Ninth Circuit's decision promoted harmony with complex state laws, encouraged bidding at sales, enhanced potential recoveries by debtors, and promoted an active marketplace for real property which are all essential to a robust economy.

That decision was not erroneous and must be permitted to stand.

For these reasons, and other reasons as may be apparent herein, this Supreme Court should not issue a Writ of Certiorari.

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